



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 498 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**TIMOTHY MUSINZI ARULA.....CLAIMANT/DECREE HOLDER**

**VERSUS**

**FRANCIS GACHANJA T/A**

**SHOWCASE PROPERTIES..... RESPONDENT/APPLICANT**

**RULING NO. 2**

1. The application before me for determination is dated 13<sup>th</sup> November 2019. The Applicant seeks the following orders:

*(i) Spent.*

*(ii) THAT this Honourable Court do grant leave to the firm of MUNGAI KALANDE & COMPANY ADVOCATES to come on record for the Respondent after judgment in place of the firm of KIDENDA ONYANGO ANAMI & ASSOCIATES*

*(iii) THAT this Honourable Court do set aside the judgment entered herein on 18<sup>th</sup> August 2017.*

*(iv) THAT this Honourable Court do strike out the name of the Respondent as a party to this cause.*

*(v) THAT this Honourable Court do enjoin SHOWCASE PROPERTIES LIMITED as a party to this cause.*

*(vi) THAT the said SHOWCASE PROPERTIES LIMITED be ordered to file a response to the claim within a period of fifteen (15) days from the date of the order in (4) above.*

*(vii) THAT the costs of this application be borne by the Claimant in any event.*

2. In the grounds supporting the application and the affidavit of FRANCIS GACHANJA sworn on 13<sup>th</sup> November 2019, it is pleaded that: -

*a) That the Respondent is not indebted to the Claimant in any way whatsoever.*

*b) That Showcase Properties Limited which is a legal entity is not a party to these proceedings.*

*c) That the Claimant obtained default judgment against the Respondent on 18<sup>th</sup> August 2017.*

*d) That the Claimant has no legal and/or contractual relationship of employer/employee with the Respondent.*

*e) That the Claimant has now instructed High Class Auctioneers to attach the Respondent's personal property.*

*f) That it is in the interest of justice that the orders sought should be granted.*

3. The Applicant further states in the affidavit in support of the application that he is a Director of Showcase Properties Limited but has been sued in his personal capacity. He denies ever employing the Claimant and avers she will suffer irreparable loss and damage should the Ex parte judgment against him not be set aside.

4. The Claimant/Decree Holder opposes the application through the replying affidavit of JASON OKEMWA Esq. Counsel for the Claimant in which he states that Francis Gachanja T/A Showcase Properties filed a similar application dated 13<sup>th</sup> December 2017 which was heard and dismissed by this Court.
5. Mr. Okemwa further states that upon dismissal of the application the Applicant through his advocates consented to pay the costs of the dismissed application together with interest.
6. That as per the Claimant's court documents at all times it is Francis Gachanja T/A Showcase Properties that was sued. That in its documents the Applicant represented himself as Francis Gachanja T/A Showcase Properties Limited. That all these refer to one and the same person or entity that was the Claimant's employer and within the definition of an Employer under the Employment Act.
7. That upon refusal to pay the decretal sum, a fresh attempt of execution commenced and Mr. Francis Gachanja entered into agreement with the Auctioneers to pay in instalments. The Claimant's Advocates decried such informal/and opaque arrangements between the Applicant and the Auctioneers.
8. That despite such arrangements, the Claimant's Advocates have received Kshs.100,000/= only paid in two instalments by the said Francis Gachanja T/A Showcase Properties Limited/Showcase Properties. The monies were remitted by them through the Auctioneers.
9. That the present application is therefore Res-judicata as both Francis Gachanja T/A Showcase Properties Limited/Showcase Properties were heard and their quest to re-open the proceedings dismissed. That there is nothing new the Respondent is litigating or prejudice suffered. That the present application is an attempt to further delay the matter and obstruct justice.
10. The Claimant avers that the application is mischievous and an abuse of court process and meant to delay justice and ought to be dismissed with costs and execution concluded.

#### Submissions

11. The application was disposed of by way of written submissions. The Applicant submits that there is no privity of contract between the Claimant and the Respondent as Showcase Properties Limited is a separate legal entity and the Applicant is only one of the three (3) Directors of the Respondent. The Applicant relies on the decision in **Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847**, in which Lord Haldane, LC stated:

*“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”*

12. The Applicant further relies on the decisions in **Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] eKLR**; **Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & Another [2014] eKLR** and **William Muthee Muthami v Bank of Baroda [2014] eKLR** all of which dealt with the issue of privity of contract.

13. The Applicant further submits that the legal position regarding incorporated entities was articulated by the Court of Appeal in **Standard Chartered Bank Kenya Limited v Intercom Services Limited & 4 Others Civil Appeal No. 37 of 2003 [2004] 2 KLR 183**, the Court of Appeal citing **Salomon v A. Salomon & Company Ltd [1897] AC 22** and **Adams v Cape Industries Pte [1990] 1 Ch 433** in which the Court held that; it is a principle of company law of long antiquity that a limited company has a legal existence independent of its members and that a company is not an agent of its members. The Court further said that the principle of alter ego attributes the mental state of company's directors or other officers to the company itself in order to fix the company with either criminal or civil liability.

14. The Applicant further submits that the corporate veil cannot be lifted except where –

- i) There must be fraud or improper conduct on the part of the company and directors/shareholders.*
- ii) The company must be basically intended to evade tax obligations.*
- iii) The company was being used to conduct criminal activities.*
- iv) There was discovery of fraudulent and improper design by the directors/shareholders of the company.*

15. He relies on the decision in case of **Mugenyi & Company Advocates v The Attorney General [1999] 2 EA 199** where the Court quoting from **Palmers Company Law Vol. 1 (22 ed)** lists the instances under which the veil of corporate personality may be lifted as follows:-

- (1) Where companies are in the relationship of holding and subsidiary companies;*
- (2) Where a shareholder has lost the privilege of limited liability and has become directly liable to certain creditors on the ground that business continued after the membership had dropped below the legal minimum, to the knowledge of the shareholder;*
- (3) In certain matters relating to taxation;*

- (4) In the law relating to exchange control;
- (5) In the law relating to trading with the enemy;
- (6) In the law of merger control in the United Kingdom;
- (7) In competition of the European Economic Community;
- (8) In abuse of law in certain circumstances;
- (9) Where the device of incorporation is used for some illegal or improper purpose: and
- (10) Where the private company is founded on personal relationship between the members.”

16. The Applicant further relies on the decision of the Court of Appeal in **Githunguri Diary Farmers Co-operative Society v Ernie Campbell and Company Limited and Another [2018] eKLR** and the case of **Corporate Insurance Limited v Savemax Insurance Brokers Limited and Another** in which the Court opined that the corporate veil cannot be lifted merely because the company has no assets to pay its debts.

17. It is further the submission of the Applicant that it is nonsuited and therefor the orders sought in the application are merited.

18. For the Claimant/Decree Holders it is submitted that the application is mischievous and an abuse of Court process for reasons that –

- *There is no agreement exhibited between Show case Properties and the Claimant for this court to ascertain such a claim and the court cannot affirm such allegations.*
- *It is noteworthy that the duty to reduce agreements into writing and to keep them and other documents for production in court as per Section 10(6) (7) and 74 of Employment Act rests with the respondent.*
- *The record and in particular the application dated 13<sup>th</sup> December 2017; the Supporting affidavit refers to the Applicant trading as Showcase Properties Limited and at all times had read the names interchangeable.*
- *The Applicant has not disputed or disclosed to court that he and Showcase Properties Limited paid through the auctioneers Kshs.100,000/- as part payment of costs and decretal amount,*
- *The Applicant admits that the property is his personal property. However there is no evidence to verify such assertion. Even if it were his personal property then the attachment is proper and lawful.*
- *A look at the general conduct of the Respondent and Showcase Properties Limited, at no time did the Applicant in person object.*
- *At all times he (Francis Gachanja) was personally served with the court documents and summons, and never objected. At some point he even attended court registry to allegedly pick hearing dates. He completely owned the proceedings and cannot turn back at this stage.*

19. The Claimant submits that Mr. Gachanja as the Proprietor, Managing Director and Promoter of Showcase Properties is an employer within the definition of Section 2 of the Employment Act which provides; **any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company”**

20. The Claimant relies on the unreported case of **Industrial Court at Nairobi Cause Number 684 of 2011 Child Welfare Society of Kenya v Margaret Bwire & Isiolo Children’s Home-Isiolo County**, where the Court emphasized the control test, stating that –

*“an employer is a person, who has the power or the right to control and direct how work is to be performed ... the Employee contributes labour and expertise to an endeavour and is in return, paid a salary at an agreed interval ... the Employer retains managerial control and apportions the Employee duties packaged into a job...other employment sources define an Employer as a person having control or custody of any employment, place of employment, or of any Employee.”*

21. It is the Claimant’s submissions that he was not employed by the Board of Director of Showcase Properties Limited but by Mr. Francis Gachanja. The Claimant relies on the cases of **Chat Engineering Enterprises Ltd v Attracting Supplies Limited, 2009 [eKLR]** and **Mema Enterprises and Njoka Tanners Ltd**. In both cases the High Court held that an objector owned and managed by the same applicant, cannot hide under statute and or the principle of **Salomon v Salomon** to circumvent execution process, or to run away from responsibilities, creditors, or court process. Warsame J. (as he then was) held that the Court *“should not shut its eyes and ear and mind and fail to see through such deceit and mischief...”*

22. The Claimant also relied on the case of **Jackson Mugolio Musunji & 3 others v Dambusters East Africa Limited [2019] eKLR** where it was held that where the employer keeps on metamorphosing and trading in different names. This Court rejected such similar objections as made by the Respondent/Applicant.

23. The Claimant submitted that the Court cannot strike out the name of a person who has fully participated in the Court process post judgement and that there is no law or precedent to such effect. That even if the court were to substitute, it cannot have a different outcome. It will be an abuse of court process, waste of judicial time, and untenable since, the Respondent is Mr. Francis Gachanja, Showcase properties and/or Showcase Properties Limited, and the Applicant is the same witnesses who dealt with the Claimant.

### **Analysis and Determination**

24. The Applicant has not contested that before filing the instant application, he filed another application dated 13<sup>th</sup> December 2017 in which he sought the following orders –

- i) THAT leave be granted by the Honourable Court for the Respondents' Advocates to come on record.*
- ii) THAT service of this application be dispensed with in the first instance and this application be certified as urgent.*
- iii) THAT there be stay of execution of the judgment dated 18<sup>th</sup> August 2017 pending the hearing and determination of this application.*
- iv) THAT this Honourable Court be pleased to set aside the judgment entered against the Respondent and to allow the Respondent to prosecute its defence.*
- v) THAT this Honourable Court be pleased to cancel, set aside, recall and lift the warrants of attachment and sale herein.*
- vi) THAT the costs of the Application be costs in the cause.*

25. The application was filed through Kidenda, Onyango, Anami & Associates. In the affidavit in support of the application, the same FRANCIS GACHANJA swore an affidavit which I quote verbatim for an appreciation of the import and tenure thereof –

- (1) THAT I am the Managing Director of the Respondent herein, fully conversant with the facts of this case and duly authorized to swear this Affidavit.*
- (2) THAT I was served personally with a letter dated 6<sup>th</sup> November inviting me to take a date for hearing of this matter on 6<sup>th</sup> November 2015.*
- (3) THAT I attended to the registry and took a hearing date for the matter which date was 18<sup>th</sup> January 2016.*
- (4) THAT I attended the hearing of the matter scheduled on the aforesaid date in the company of my then Counsel Mr. Kennedy Bwomote on 18<sup>th</sup> January 2016.*
- (5) THAT the Claimant did not attend the aforesaid court session and Mr Kennedy Bwomote indicated to the Court that he was yet to be served with any pleadings.*
- (6) THAT the court ordered that the Respondent be served with the Memorandum of Claim in relation to this matter.*
- (7) THAT to date, I have not received any pleadings in relation to this matter and have been completely unaware of any further proceedings.*
- (8) THAT I was therefore caught by surprise when I was served with a proclamation notice on 7<sup>th</sup> December 2017 for proclamation on 12<sup>th</sup> December 2017.*
- (9) THAT I had never been given a chance to file any documentation and all along I believed that the claim had been withdrawn.”*

26. In the instant application the same FRANCIS GACHANJA now applies for similar orders of stay of execution and seeks to be removed from the proceedings and replaced by Showcase Properties in which he has conceded he was the Managing Director. In the draft Response to Claim he filed with the application dated 13<sup>th</sup> December 2017 he conceded at paragraph 2 to 6 that –

- (2) Pursuant to an oral agreement with the Respondent on or about September 2006, the Respondent employed the Claimant as a Casual Labourer for intermittent and disjunctive periods from September 23<sup>rd</sup> 2006 to December 1<sup>st</sup> 2007 and was paid at the average daily rate of Kshs.450.*
- (3) From 1<sup>st</sup> December 2007 to sometime around December 2010, the Respondent continued to employ the Claimant and diligently paid all dues that were owing to him for the entire period covered.*
- (4) On or about December 2011, the Respondent faced construction challenges that rendered it impossible to continue with the project to due to faulty supply of construction materials.*

*(5) These circumstances were beyond the Respondent's Control and as such he instituted a suit against the suppliers through Civil Suit No. 577 of 2011 for damages lor supply of defective concrete.*

*(6) Despite these challenges the Respondent continued to pay the employee till sometime around November 2012 where he had exhausted all his funds and as such could not continue paying the Claimant."*

27. In the Response to Claim, the Applicant contended that he was the employer of the Claimant. In the instant application he now makes an about turn denying that he is the employer. He cannot in one breath be the employer and in another deny the same. He is estopped from denying that which he has conceded and even made part payment of the outstanding debt.

28. It is also not lost to Court that both the instant and the earlier applications have only been made whenever the Applicant is threatened with execution.

29. The foregoing notwithstanding, the Claimant has never claimed to be an employee of Showcase Properties Limited. The suit as filed is against the Respondent/Applicant alone. Further, should the Applicant have wanted to enjoin Showcase Properties Limited to these proceedings, there is no reason why he should not have done so in his Response to Claim filed with the application on 13<sup>th</sup> December 2017, or in the least, the first time he learned that he had been sued.

30. This is a litigant who does not deserve any of the orders sought. I agree with the Claimant/Decree Holder that the application is an abuse of Court process and the only fate for such an application is dismissal.

**31. The application is accordingly dismissed with costs for being an abuse of Court process.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF JANUARY 2022**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**